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No. 81-2135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNIROYAL, INC.,
Petitioner,

v.

ALTA CHRAPLIWY, *et al.*,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF AUTHORITIES

Cases	Page
Hensley v. Eckerhart, United States Supreme Court, No. 81-1244 (May 16, 1983)	*passim*
Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982), petition for cert. filed No. 81-2135, (petn. filed May 19, 1982)	*passim*
City of Mishawaka, Indiana, et al. v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978)	6
Chrapliwy v. Uniroyal, Inc., 509 F.Supp. 442, 451 (N.D. Ind. 1981)	4, 5
City of Mishawaka, Indiana v. American Electric Power Co., Inc., 465 F.Supp. 1320 (N.D. Ind. 1979), *aff'd in part and vacated in part*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981)	*passim*
Chrapliwy v. Uniroyal, Inc., 12 F.E.P. Cases 1661, 1663 (N.D. Ind. 1976)	3

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Pursuant to Rule 22.6 of the Rules of this Court, Respondents Alta Chrapliwy, et al., respectfully submit this Supplemental Brief to address the significance of this Court's recent decision in *Hensley* v. *Eckerhart*, No. 81-1244 (May 18, 1983), to the pending petition for certiorari in this case.

Nothing in *Hensley* warrants this Court's review of the decision of the United States Court of Appeals for the Seventh Circuit in *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *petition for cert. filed*, No. 81-2135 (petn. filed May 19, 1982). To the contrary, the reasoning of the Court's opinion and the separate concurring

opinions in *Hensley* confirms the correctness of *Chrapliwy* and provides no basis whatsoever for believing that the Seventh Circuit might alter its position if required to reconsider the case. Accordingly, *Hensley* does not support the grant of certiorari in this case, and likewise provides no basis for vacating *Chrapliwy* to require the Seventh Circuit to consider anew issues that were carefully and correctly decided there in the first instance.

The sole question presented and decided in *Hensley* is whether "a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims." *Hensley*, *supra*, slip op. at 1. As the Court's opinion explained, "the most critical factor [in assessing the reasonableness of the prevailing plaintiff's fee award] is the degree of success obtained." *Id.* at 11.

> Where a plaintiff has obtained excellent results, his attorney should receive a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.

Id.

The record in this case leaves no room for doubt that the plaintiffs in *Chrapliwy* fully prevailed. Plaintiffs here obtained a settlement agreement that required defendant Uniroyal to pay the 526 members of the plaintiff class cash and pension benefits totaling $9,318,000, to reinstate 296 terminated class members to active employment with full seniority, and to improve job opportunities for all female workers. Plaintiffs understand that this remains the largest recovery in any case of sex discrimination in employment at a single industrial plant.

There likewise can be no question that plaintiffs' efforts to have Uniroyal debarred as a federal contractor

forced the company to settle this Title VII case.[1] As the Seventh Circuit explained, the plaintiffs' pursuit of Uniroyal's debarment as a federal contractor was a reasonable litigation response to the delay occasioned by the death of the presiding judge and to the appearance "that defendant was taking advantage of the situation, and doing nothing to provide relief for the members of the plaintiff class." 670 F.2d at 763. Indeed, the district court had earlier found that plaintiffs' pursuit of this means of redress was necessary to discharge their responsibilities.

> As representatives of the class, they were charged with the responsibility of initiating whatever action would be necessary to vindicate the rights of the entire class against the alleged discriminatory employment practices of Uniroyal.

Chrapliwy v. *Uniroyal, Inc.*, 12 F.E.P. Cases 1661, 1663 (N.D. Ind. 1976).

Plaintiffs' effort was successful, and forced Uniroyal to settle this Title VII case in order to retain its lucrative federal contracts. As the Seventh Circuit explained:

> The plaintiffs at all times pursued their Title VII action. Their efforts to have the defendant debarred from its federal contracts on the basis of the same discrimination charged in the Title VII action were designed to move the Title VII case toward ultimate disposition. This desired effect was achieved, because

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[1] The term "debarment" refers to cancellation of existing federal contracts and the declaration of ineligibility to obtain future federal contracts pursuant to Executive Order 11246 and related federal regulations, which prohibit employment discrimination based on race, color, religion, sex, or national origin by those who contract with the federal government, and which impose affirmative obligations on federal contractors to ensure that their employees are not subjected to discrimination. The Secretary of Labor and the Director of the Office of Federal Contract Compliance Programs are responsible for the issuance and enforcement of regulations under the Order. *See generally*, 41 C.F.R. Ch. 60 (1981).

> the threat of debarment on account of discrimination caused the defendant to settle the Title VII action. Thus, the plaintiffs' pursuit of debarment was a service which contributed to the ultimate termination of the Title VII action and in that sense was within the Title VII action.

670 F.2d at 767.

Nor can there be any dispute as to the direct impact of plaintiffs' pursuit of the debarment remedy on the successful settlement of the Title VII case. Both the district court and the Seventh Circuit concluded that plaintiffs' pursuit of the debarment remedy "directly contributed" to the successful settlement of the Title VII case. Indeed, as the court of appeals noted, defendant Uniroyal conceded that point:

> The district court found that the plaintiffs' efforts to persuade the government to debar the defendant from its federal contracts directly contributed to the settlement of the Title VII action. The defendant admitted that it would not have settled the suit if the threat of debarment did not loom near.

670 F.2d at 673, citing *Chrapliwy* v. *Uniroyal, Inc.*, 509 F.Supp. 442, 451 (N.D. Ind. 1981), *aff'd in part and rev'd in part*, 670 F.2d 760 (7th Cir. 1982), *petn. for cert. filed*, No. 81-2135, (May 19, 1982).

In this context, it is clear that *Hensley* provides no support for Uniroyal's challenge to the district court's authority to award attorney's fees for plaintiffs' work in forcing settlement of the Title VII case by causing Uniroyal's debarment as a federal contractor. To the contrary, *Hensley* confirms that the award of attorney's fees for this dispositive litigation effort was clearly correct.

The second basic question posed by Uniroyal's petition relates to the applicable rate for the award of attorney's

fees. Uniroyal's position on this issue is that the rates for plaintiffs' lead counsel—a Washington attorney with substantial experience in complex litigation—must be limited to the rates charged by members of the local bar in Indiana, where the litigation was conducted. Again, however, *Hensley* confirms the correctness of the Seventh Circuit's ruling that the hourly rates charged by plaintiff's lead counsel were reasonable.

The record discloses that both sides extensively relied on the services of "similarly skilled and expensive counsel to represent its interests in this suit." 509 F.Supp. at 455. The district court specifically noted, moreover, that "[i]t would not advance the congressional policies . . . to arbitrarily limit plaintiffs' attorneys to the local billing rate when the defendant has utilized the resources of equally expensive, and presumably equally talented, attorneys." 509 F.Supp. at 456. Finally, the record also reveals that the rates sought by plaintiffs' lead counsel and awarded by the court of appeals were the same as the rates that counsel had actually charged in other litigation in the very court in which the fee award was sought, and were comparable to the rates Uniroyal paid its defense counsel. *See* 509 F.Supp. at 456.[2]

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[2] Uniroyal belatedly maintains in its petition for certiorari that the district court was required to develop a factual record establishing that plaintiffs' lead counsel, Thomas R. Ewald, actually charged the rate sought in this case to other clients. That issue was not raised in the district court, however, and was invented for the first time on appeal. In any case, it is a non-issue. Plaintiffs' answers to Uniroyal's interrogatories propounded in the fee litigation implicitly indicate that the rates given are counsel's actual rates. Furthermore, the published decisions of the United States District Court for the Northern District of Indiana and of the Seventh Circuit demonstrate the extensive experience of plaintiffs' lead counsel in other litigation in the very court in which the fee award was sought. See City of Mishawaka, Indiana v. American Electric Power Co., Inc., 465 F.Supp. 1320 (N.D. Ind. 1979), aff'd in part and vacated in part, 616 F.2d 976 (7th Cir. 1980),

Under these circumstances, any award based on rates other than those sought by plaintiffs and allowed by the Seventh Circuit would not provide the "fully compensatory fee" that the *Hensley* Court recognized a counsel for a civil rights plaintiff who obtains "excellent results" should expect, *Hensley, supra*, slip op. at 11; *see also* Brennan, J., concurring in part and dissenting in part, slip op. at 7.

One final factor argues strongly for denial of certiorari: the time has long since passed for this litigation to end. This Title VII case was filed in November 28, 1972, and culminated in a successful settlement in October 23, 1979. During this period of protracted litigation, plaintiffs' counsel received no fees whatsoever. Litigation over attorney's fees began in the spring of 1980, and that litigation has now continued for three years. Indeed, this petition for certiorari has been pending for one year.

Bearing in mind the *Hensley* Court's admonition that "[a] request for attorney's fees should not result in a second major litigation," *Hensley, supra*, slip op. at 12; *see also* Brennan, J., concurring in part and dissenting in part, slip op. at 14, it is clear that this petition should be denied and this seemingly interminable litigation be brought to its conclusion. Although plaintiffs' counsel received an initial interim award of some of the fees they earned and an additional partial award of fees that were not contested on appeal, the majority of the total fees to which counsel are entitled remain unpaid, more than a

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cert. denied, 449 U.S. 1096 (1981); City of Mishawaka, Indiana, et al. v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978). Thus, the hourly rate sought by plaintiff's lead counsel was not an "out of town" rate, but rather the "local" rate this attorney has charged in other cases before the same district court, just as were the comparable rates Uniroyal paid its defense counsel from New York, Washington, and Chicago.

decade after this lawsuit was begun. Clearly, this is an instance where further litigation over attorney's fees would simply further delay the inevitable, to the disservice of the objectives of the civil rights statutes and the judicial system that enforces them. Respondents therefore respectfully urge that certiorari be denied.

Respectfully submitted,

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